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C O N F I D E N T I A L SECTION 01 OF 02 HONG KONG 002093

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SUBJECT: LEHMAN MINIBONDS CRISIS SPURS LEGCO TO USE
SUBPOENA POWERS

REF: HONG KONG 2027

Classified By: Consul General Joe Donovan for reasons 1.4 (b) and (d).

1, (SBU) Summary and comment: Hong Kong's Legislative Council (LegCo) voted November 12 to convene a Select Committee to compel testimony to investigate the Lehman Brothers minibond controversy under its Powers and Privileges Ordinance. This use of LegCo's most powerful tool of inquiry, its first since the SARS crisis in 2003, required a majority of both Geographic Constituency and Functional Constituency members -- a "bipartisan" coalition of pan-democratic and pro-establishment forces difficult to muster in Hong Kong's polarized political environment. The growing role of LegCo in the public's mind as a "check" on the Executive, as well as the growing willingness of the government's putative allies to criticize the Administration, may mean the law (or its threat) will be invoked more frequently in the future. The pro-Beijing Democratic Alliance for the Betterment of Hong Kong's (DAB) last-minute decision to support the Committee is the strongest indicator to date the DAB is willing to vote "against" the government if it sees a political gain in doing so. End summary and comment.

12. (C) The Legislative Council (LegCo) voted November 12 to invoke its powers under the Legislative Council (Powers and Privileges) Ordinance (PPO) to convene a Select Committee to investigate the Lehman Brothers minibond controversy (see reftel for background). We spoke prior to this vote with Solicitor General Ian Wingfield (strictly protect) regarding the scope of the law and the ability of those subpoenaed under its powers to seek relief from disclosure. We also discussed LegCo's decision to investigate the minibonds issue with Legal Functional Constituency representative Margaret Ng, a senior barrister and member of the Civic Party, which has backed the probe. The full text of the PPO is available at www.hkllii.org/hk/legis/en/ord/cur/382.txt.

13. (C) The PPO is normally only applicable to the full LegCo, under the authority of the LegCo President, or one of the three Standing Committees (Finance, Public Accounts, and Members' Interests) under the authority of the Chair. Wingfield told us the full Council has never invoked the PPO. The Standing Committees' briefs do not cover investigations into issues like the minibonds or the approval by the Civil Service of a retired senior official's employment with a real estate conglomerate with which his office had dealings (the other recent issue for which an investigation using PPO powers was considered, but not implemented). Issues such as these are pursued by convening a Select Committee.

14. (SBU) While convening such a Committee requires a simple majority vote, empowering it to subpoena witnesses and evidence under the PPO requires a majority vote in LegCo from both the 30 Geographic Constituency seats and the 30 Functional Constituency seats, which effectively requires a "bipartisan" vote of the pan-democratic and pro-establishment/pro-Beijing camps. The last time LegCo so

empowered a committee was in the wake of the SRS crisis in 2003. Both the DAB and, perhaps even more surprisingly, the pro-business Liberal Party supported this resolution, rejecting the government and banking sector's contention that an inquiry with such far-reaching powers could damage Hong Kong's reputation as a financial center.

15. (C) Once empowered, the Select Committee can compel with legal force any person to appear and testify and can also command the submission of any documentary evidence. Failure to comply with a LegCo subpoena can incur both a fine and imprisonment, although the law requires the concurrence of the Secretary of Justice to actually prosecute. A few exceptions are explicit in the law. The first is a general carve-out for military or security information, or information relevant to the responsibilities reserved to the Central Government under the Basic Law. Only a government officer authorized to do so by the Chief Executive may testify on these matters.

16. (C) A second group of exceptions Wingfield likened to those which would be recognized by a court, such as attorney-client privilege. Business proprietary information and information normally covered under bank secrecy laws might be considered, but would not be reckoned as innately compelling. Information may be withheld that passes a test of being both "personal" and "not relevant" to the current inquiry -- a determination made by either the LegCo President or the Committee Chair (with the Chair's decision reviewable by the President).

17. (C) Ng named Public Interest Immunity (PII), which is not

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in the PPO but is recognized in Hong Kong as a Common Law standard, as an additional exception. Under PII, the government may argue that the value of providing a particular document to a PPO-empowered committee is outweighed by damage to the public interest caused by the disclosure (for example, revealing law enforcement sources and methods). Should LegCo reject the government's claim to PII, the government may apply to the courts.

18. (C) All testimony and evidence given in accordance with the PPO is automatically "immunized" from use as evidence in court, with the exception of perjury charges which may be leveled by the Committee. The PPO also specifically protects LegCo's administrative staff as well from being called to testify in legal actions relevant to issues heard under PPO authority. Therefore, protection from self-incrimination is not automatic grounds to decline to testify or furnish evidence. Ng was vague on whether there were absolutely no grounds to claim this exception, but stressed such an assertion would be difficult to validate given the immunity provided in the proceedings. That said, given that LegCo normally operates open to public observers, Wingfield noted the immunity granted under PPO may not protect witnesses from public and media criticism.

19. (C) Wingfield told us that PPO-empowered Select Committees have tended to be flexible in the application of their powers, accepting such compromises as being presented with "relevant" portions of larger documents, or being permitted to examine, but not retain, some materials. LegCo can also elect to hear testimony "in camera" (closed session), although Wingfield noted that, in his experience, LegCo members were reluctant to do so. Ng cited an example in which, although LegCo rejected the government's assertion of PII and the government was readying a court challenge, in the end the two sides agreed the committee chair alone would be allowed to view, but not retain, a particular document.

110. (C) For those under subpoena, but not protected by one of the exceptions noted above, there are two possible routes to relief from obligation to testify or provide evidence. The first would be to appeal a decision by the Select Committee

Chair to the LegCo President. (Comment: A dubious course of action -- empowering a Select Committee requires such broad support in LegCo that a Presidential decision to then overrule the Committee would presumably entail substantial political cost. End comment.) The second would be litigation. LegCo's "lawful" application of its powers under PPO is not subject to judicial review, so the plaintiff would need to argue the Committee's actions were in some way "unlawful", such as attempting to breach attorney-client privilege. Given the legal expertise available to LegCo as an institution and the number of lawyers who are Members, Wingfield suggested the possibility of LegCo attempting such an "unlawful" action would be remote.

DONOVAN